1988

Ted Sherill Whitehouse v. Kathleen Shileds Whitehouse : Brief of Respondent

Utah Court of Appeals

E.H. Fankhauser; Attorney for Respondent.
Frank R. Mohlman; Mohlman and Young; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

TED ~~SHERILL WHITEHOUSE~~ 880491,	
PLAINTIFF/RESPONDENT,	
VS.	APPEAL NO. 880491-CA
KATHLEEN SHIELDS WHITEHOUSE,	PRIORITY 14B
DEFENDANT/APPELLANT	

BRIEF OF RESPONDENT

APPEAL FROM AN ORDER MODIFYING A DECREE OF DIVORCE MADE IN THE THIRD DISTRICT COURT IN AND FOR TOOELE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK PRESIDING.

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CASE LAW

Respondent accepts and incorporates Appellant's statements regarding jurisdiction, nature of proceedings, statement of the case, and determinative statutes and other ordinances, rules and constitutional provisions.

STATEMENT OF ISSUES

1. WAS THE JUDGMENT AND DECREE OF DIVORCE AMBIGUOUS AS TO ELEMENTS NECESSARY TO ITS ENFORCEMENT AND DID THE COURT BELOW PROPERLY EXERCISE ITS EQUITY POWERS TO CORRECT THOSE DEFICIENCIES?

STATEMENT OF FACTS

Respondent wishes to clarify the facts as stated by Appellant by quoting the transcript:

> It is this Court's further observation that the Decree of Divorce is deficient and/or ambiguous in certain particulars requiring clarification by this Court. In an effort to avoid or forestall what surely will be future continuing litigation between these parties, this Court will now clarify the meaning of certain language in the Decree as part of the modification process.
>
> Certainly it is accurate, in my view to state that the Decree, insofar as it relates to the equity in the home is not clear. It is not, in this Court's view, in compliance with the understanding of the parties. It is this Court's view therefore, that the meaning of the language contained in paragraph six of the Decree that the Plaintiff was awarded $15,000 in equity in the home to be paid at the earlier of the following events: Specifically, the remarriage of the Defendant or the selling of the home within

> seven and a half years, or seven and a half years, whichever occurs first.
>
> ...
>
> It is this Court's further observation that the Decree of Divorce is likewise deficient and/or unclear in the circumstances regarding the payment of the retirement benefit owing to the Defendant from the Plaintiff's retirement. There is no payment date set forth in the Decree. It, in this Court's view, would not have been in the parties' best interests to require that the Plaintiff pay to the Defendant the retirement sums that he is obligated to pay from his termination from his employment as that would have had a significantly unfavorable effect upon the value of that retirement account and accordingly, the fact that the Plaintiff has rolled it over for tax purposes into an IRA, in this Court's view was entirely appropriate. (T. 67-68, emphasis added)

On or about August 4, 1988, Respondent's counsel was contacted by counsel for Appellant for the purpose of enforcing the judgment of Judge Frederick. (See appendix A, letter from Mr. Mohlman to Mr. Fankhauser) Respondent did not initiate this action, but nevertheless issued the requested deed subject to the lien mentioned in the letter. (see appendix B, quit-claim deed as prepared by Appellant and signed by Respondent, and the specific reference in paragraph 3 of the same to the court's order of May 23, 1988) The amount of the lien was equal to Respondent's $15,000 equity in the home minus the offset awarded to Appellant, and totaled $6,431.000.

SUMMARY OF ARGUMENT

Respondent argues that although the provisions regarding alimony and child support, which were not appealed, were clearly modified as per the Decree of Divorce, that the court below, rather than executing a modification

of the Decree instead simply clarified the meaning of certain passages of language so that they could be executed equitably. Such clarification was necessary because the Decree could not be executed with respect to the equity in the home or the retirement funds without such clarification.

Respondent further argues that the provisions of Acton v. Deliran, 737 P. 2d 996 (Utah 1987) are inapplicable to the issues raised in this appeal. The cases cited in point II of Appellant's brief involved, insofar as they concerned the subject of divorce, the execution of an original Decree of Divorce and not the modification of an existing decree.

Respondent argues that the issues presented in this appeal are moot, the judgment of the court below having been voluntarily enforced by Appellant. This appeal should therefore be dismissed for want of a justiciable issue.

ARGUMENT

POINT I

THE JUDGMENT AND DECREE OF DIVORCE ARE AMBIGUOUS AS TO ELEMENTS NECESSARY TO ITS ENFORCEMENT AND THE COURT BELOW PROPERLY EXERCISED ITS EQUITY POWERS TO CORRECT THOSE DEFICIENCIES.

The courts of the State of Utah retain an important and high degree of latitude in the exercise of equity powers and the modification of a Decree of Divorce. Such was clearly established in both Beckstead v. Beckstead, 663 P. 2d 47 (Utah 1983) and Mitchell v. Mitchell, 527 P. 2d 1359 (Utah 1974) The jurisdiction of the courts in the matter of modification of decrees is continuing, and insofar as the exercise of that jurisdiction is based upon a material change of circumstances the doctrine of *res judicata* is inapplicable.

In this sense, the trial court, in modifying a Decree of Divorce can in equity exercise the same authority as it could have in the instance of the divorce itself. (Mitchell at 1360) There is also as strong presumption of the validity of the trial court's determination of the existence of a material and substantial change in circumstances which authorized the modification. (Mitchell at 1360-1361)

In exercising this broad power in equity, the court can determine the most equitable division of the property of parties to a divorce, in keeping with an agreement forged by the parties, subject to the court's interpretation of the language of the agreement as per the intent of the parties at the time of the agreement. (Land v. Land, 605 P. 2d 1248 (Utah 1980) at 1250-1251) Following the reasoning of Land, the trial court, upon a determination of the ambiguity of a certain passage of a contractual property settlement which is incorporated into a Decree of Divorce, can interpret that language in a reasonable fashion so as to render it clear and unambiguous. Importantly, a trial court is under no obligation to accept a stipulation of parties to a divorce concerning a division of marital property, but once it does so, the court "may modify such agreement or stipulation at the time of divorce or subsequently". (Huck v. Huck, 734 P. 2d 417 (Utah 1986) at 419)

Having embarked upon a course of unappealed modification, and having been moved by the parties to do so, the court below at that time attempted to prevent future litigation by clarifying the Decree in question as to the time and method of payment of equity in the home ($15,000) by Appellant and the payment of equity in the form of retirement funds by Respondent. Appellant argues that the language of the Decree with respect to the equity interest of Respondent in the home and the time and terms of payment thereof was clear and unambiguous. The Decree states:

> 6. The Defendant is awarded the parties real property located at 356 Isgreen Circle, Tooele, Utah, subject to Plaintiff's interest in one half of the equity of said residence existing as of the date of the divorce herein in the sum of $15,000.00 conditioned upon the Defendant's selling said residence or remarrying within seven and one half years of the date of the decree herein Said property is located in Tooele City, Tooele County, and [the legal description followed] (See copy of the decree as contained in Appellant's brief at 'addendum i')

This paragraph contains a seeming contradiction. It clearly states that Respondent was vested with, at the time of the Decree, $15,000 in equity in their marital home. The award of the home to Appellant was made "subject to Plaintiff's [Respondent's] interest in one half" of it. The Decree does not set a time for payment, except that it shall be due and owing when Appellant marries or sells the home, within 71/2 years of the date of the Decree. Appellant argues that if she neither sells nor marries, at the end of 71/2 years, the equity would be divested of Respondent and he would thereafter have no interest whatsoever in the home. This is contrary to the testimony of Respondent at the hearing for modification. Referring to the equity in the home, Respondent was asked by counsel when he believed the equity would become due and payable, to which he responded: "After seven and a half years." (T. 21)

Appellant's argument that after 7 1/2 years Respondent's equity would terminate poses, if enforced, the following problems: 1) Should Appellant remarry, she would be penalized by having to pay off the equity due and owing as of that event; 2) Should Appellant sell the home during the 7 1/2 year period, she would be penalized by having to pay the said equity; 3)

Should Appellant choose to neither marry nor sell the home, then Respondent would be penalized by losing his equity in the home. All of the events necessary to trigger the payment or non-payment of the equity were in the exclusive control of Appellant. Appellant could, in effect choose to either punish herself, or to punish Respondent, using the courts of this state and the equity that supposedly vested in Respondent at the time of divorce, as the toll of that punishment. The court below, based upon the testimony offered and its understanding of the Decree, declined to accept Appellant's arguments, and found instead that the language of the Decree was deficient and ambiguous.

The conflicting testimony of the parties concerning the meaning of paragraph six of the Decree, although only some evidence of an ambiguity (see Land at 1251), provides adequate foundation for the Court's finding of ambiguity when considered in light of the language of the Decree itself. The court properly concluded that it needed to supply certain language in order to make the paragraph enforceable by the parties. The court declined to add language to the Decree that was in excess of its intent to merely clarify, and thus declined to actually modify the Decree as such. For that reason the additional language sought by Respondent concerning co-habitation, etc., was not added, as it was not mentioned in the original decree. (T. 68)

The Decree likewise contained no time or terms for the payment of Respondent's retirement benefits as per the Decree. The court below, in offsetting the amount of retirement due and owing following Respondent's termination at Safeway/Farmer Jack was in fact a setting of the time and terms of payment. The court in effect said 'now is the time for paying the retirement equity, and the method of payment will be this offset. Appellant has, therefore received all of the equity due and owing on the retirement of

Respondent, and the fact that it was an offset against Respondent's equity in the home represents a real increase to Appellant equal to the sum offset, in no way is at variance with the terms of the Decree and was a proper exercise of the equity powers of the court. Appellant seemingly wishes to add to the hardships of lost employment and burden Respondent by forcing the payment of the retirement benefits in cash thereby incurring a heavy tax liability to be paid by Respondent.

There has been no evidence that the court below abused its discretion, which is broad pursuant to its powers of equity, or that the evidence below did not support the court's conclusions. Absent such demonstrations, and in accordance with the case law already cited, this appeal cannot stand and should be dismissed.

POINT II

APPELLANT'S CHOICE TO ENFORCE THE JUDGMENT BELOW THROUGH ACQUISITION OF A QUIT-CLAIM DEED AND LIEN, RENDERS THE ISSUES RAISED IN ITS BRIEF MOOT.

Black's Law Dictionary defines "moot" as:

> [A] case in which the matter in dispute has already been resolved and hence, one [is] not entitled to judicial intervention unless the issue is a recurring one and likely to be raised again between the parties. (Black's Law Dictionary, 5th edition, 1979 at 909)

That definition is supported by Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1. By electing to enforce the judgment below, the issues before the court below, that is the question of the

meaning of the language in the Decree concerning equity in the home, and the time and method of Respondent's surrendering retirement funds, were decided. The issues were resolved by the parties following the judgment. To hold otherwise allows Appellant to have her cake and eat it too. Appellant can enjoy the benefits of added equity to her home, through a reduction of Respondent's lien from $15,000 to $6,431. The financial benefits thus realized are significant. Thereafter, should this appeal be upheld, appellant is in an even better position, whereas if the appeal is dismissed Appellant is in no worse position than if the judgment had never been appealed. Again, Appellant uses the courts of this state for improper purposes, that is to improve her position in this matter, irrespective of the outcome. Appellant has elected to enforce the judgment, to enjoy its benefits and must now be denied access to this Court, and its powers through appeal.

CONCLUSIONS

The court below, rather than executing a modification of the Decree, simply clarified the meaning of certain passages of language so that they could be executed equitably. Such clarification was necessary because the Decree could not be enforced with respect to the equity in the home or the retirement funds without such clarification.

The provisions of Acton v. Deliran, 737 P. 2d 996 (Utah 1987) are inapplicable to the issues raised in this appeal. The cases cited in point II of Appellant's brief involved, insofar as they concerned the subject of divorce, the execution of an original Decree of Divorce and not the modification of an existing decree. The level of detail required to set an original amount of alimony and child support in findings of fact is much higher than that required to establish a change of circumstances or to allow a court to exercise

it power of equity to modify or clarify a Decree of Divorce. The issues raised by the cases Appellant cites in point II of its brief involved the appeal of an original Decree of Divorce, not the level of detail necessary to affect a modification of a Decree years after the fact.

The issues presented in this appeal are moot, the judgment of the court below having been voluntarily enforced by Appellant. This appeal should therefore be dismissed for want of a justiciable issue, and Respondent so prays.

Respectfully submitted this _____ day of December, 1988.

_____

Ephraim H. Fankhauser

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing was mailed, postage prepaid to Frank T. Mohlman, Mohlman & Young, 250 South Main Street, Tooele, Utah 84074, on this _____ day of December, 1988.

_____

Ephraim H. Fankhauser

APPENDIX A

MOHLMAN & YOUNG

ATTORNEYS AT LAW

250 SOUTH MAIN STREET · P O BOX 87 · TOOELE UTAH 84074 · 801/882-1618

FRANK T MOHLMAN
M DON YOUNG

August 4, 1988

E.H. FANKHAUSER
660 SOUTH 200 EAST - SUITE 100
SALT LAKE CITY, UTAH 84111

Re: Whitehouse v. Whitehouse

Dear Mr. Fankhauser:

Enclosed please find a quitclaim deed which requires your client's signature. As you can see in the body of the deed, I reserved the lien interest in the property to your client.

As you are probably aware, I am intending to file an appeal on the ruling of Judge Frederick, and if we are successful on the appeal, I would expect your client to issue a new quitclaim deed without the reservation of the lien interest.

Please contact me if you have a different understanding about the case than I have indicated. Please forward the deed back to me as soon as possible.

Very truly yours,

MOHLMAN AND YOUNG

FRANK T. MOHLMAN

FTM/rw

Enclosure

LT20

APPENDIX B

QUIT-CLAIM DEED

TED S. WHITEHOUSE, c/o E.H. Fankhauser, 660 South 200 East, Suite 100, Salt Lake City, Utah 84111, GRANTOR, hereby QUIT-CLAIMS to KATHLEEN S. WHITEHOUSE, 356 Isgreen Circle, Tooele, Utah 84074, GRANTEE, for the sum of TEN DOLLARS and other good and valuable consideration, all of his right, title, and interest in the following described real property in Tooele County, State of Utah, and any buildings and appurtenances thereunto attached:

> Lot 14, Isgreen addition, Tooele City, according to the official plat thereof, as recorded in the office of the Tooele County Recorder, subject to easements, restrictions, and rights-of-way appearing of record or enforceable in law or equity.

This deed is subject to a lien in favor of Grantor in the amount of $6,431.00 to be paid when Grantee remarries, the home is sold or seven and one-half years from the date of the Decree of Divorce, whichever event first occurs. (Civil No. 83-080-Order May 23, 1988)

Witness the hands of said Grantor this 15 day of AUGUST, 1988.

Ted S. Whitehouse

TED S. WHITEHOUSE

STATE OF UTAH)
(ss.
County of Tooele)

On the 15 day of AUGUST, 1988, personally appeared before me TED S. WHITEHOUSE, the signer of the within instrument, who duly acknowledged to me that he executed the same in my presence.

Kathleen H. Fankhauser

Notary Public residing in
Tooele, Utah 84074

NOTARY PUBLIC
My Commission Expires
STATE OF UTAH

My commission expires:
9-25-91

LMAN & YOUNG
TORNEYS AT LAW
50 SOUTH MAIN
OELE, UTAH 84074